Ganad Media Sdn Bhd v Big Tree Outdoor Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-03(IM)-5–01 OF 2021 AND W-03(IM)-71–09 OF 2021
HANIPAH FARIKULLAH, SUPANG LIAN AND GUNALAN MUNIANDY JJCA
12 MAY 2024

Civil Procedure — Assessment of damages — Whether damages were assessed based on the period of temporary occupation license ('TOL') issued — Whether damages had been proved — Whether court was functus officio to hear motion on its judgment on interest

Land Law — Temporary Occupation Licence — Whether there was renewal of TOL — National Land Code s 67(3)

These were two appeals by appellant against the decision of the High Court which had allowed the appeal to Judge in Chambers by Metramac Corp Sdn Bhd (first respondent) and Big Tree Outdoor Sdn Bhd (second respondent) and overturned the decision of the senior assistant registrar ('SAR') of the High Court and awarded the appellant nominal damages of RM50,000. It was the first respondent's case that pursuant to a concession agreement dated 13 February 1992 between itself and Dato Bandar Kuala Lumpur, the first respondent was given the right to deal with a piece of land ('the land'). The first defendant had then by an agreement dated 9 May 1995 with the second respondent granted a license to the latter to manage, operate and maintain any advertising hoardings or matters related to the concession area which included the land. Later in year 2002, the appellant was granted a temporary occupation license ('TOL') by the land administrator to the same land. The appellant possessed the TOL on the land for two different periods, from 2002–2005 and from 2011–2015. On 15 June 2002, appellant attempted to enter the land to construct a two-sided Unipole on it. However, it was prevented from doing so by the first respondent as the second respondent was occupying the land. The first respondent continued to prevent the appellant from entering the land for the subsequent years. In 2003, the appellant commenced a suit in the High Court against both the first and second respondents sought to declare its rights under the TOLs and damages for trespass on the land as both the first and second respondents had benefitted from the land to appellant's detriment as the latter could not advertise on the land despite holding a TOL on the land. In mid-2005, the first respondent brought third party proceedings in the same civil suit against the land administrator for issuing TOLs to the appellant.

Whilst the dispute was ongoing between the parties, there was no TOLs granted to the appellant during the period of 2006–2010. After the assessment of damage, the SAR granted total damages to the appellant to be RM6,076,817.84 Both respondents appealed to the judge in chambers. The learned High Court judge ('HCJ') then allowed the first and second respondents' appeal, set aside the order of the SAR and substituted it with an order that the first and second respondents to pay the appellant nominal damages in the sum of RM50,000 together with interest at 5%pa from 26 December 2003 (the date of filing of the writ) until full settlement. Hence, the appeal.

Held, allowing the appeal:

(1) There was clear evidence to the contrary before the SAR that the appellant possessed TOL for the period 2002–2005 and 2011–2015. The first respondent itself in its submission conceded that the appellant had possessed a TOL from 2002–2005 and 2011–2013 and that there was no TOL was obtained from the years 2006 - 2010. The appellant only claimed for damages until 2013 and not until 2015 as the respondents had given vacant possession of the land to the appellant in early 2014 (see paras 29–30).

(2) The court found that the TOL had expired in 2005 and there was no evidence of renewal by the Land Administrator for the subsequent years from 2006–2010. In this regard, the renewal of TOL was not automatic as it was at the sole discretion of the land administrator as provided under s 67 of the National Land Code ('the NLC') that the TOL was only valid for a period of one calendar year pursuant to s 67(3) of the NLC. Given that the appellant had neither acquired proprietary right over the land nor acquired any right as a licensee under a TOL for the period 2006–2010, the court was of the view that the appellant had no legal/equitable rights whatsoever over the land during that period. The appellant's right over the land as licensee under a TOL was restricted only to the period 2002–2005 and 2011–2013. It follows that the appellant was not entitled to damages for the period from 2006–2010 (see paras 34 & 36–37).

(3) The court was of the considered view that the learned SAR was plainly wrong in relying on the MAL-TEL contracts as the basis for its quantification of the quantum of damages for the period of 2002–2005 since it would not represent or reflect a fair rental at market rates at that material time given that the MAL-TEL contracts were only executed in 2011/2012 indicated market rates in the year 2011 and 2013. Hence, they were best to be utilized as a basis to compute damages for the period from 2011–2013. As for the damages for the period from 2002 – 2005, the court was of the view that the calculation of damages should be based

on the profits that the second respondent made back in around 2003 ie RM250,000 per annum as clearly admitted by the second respondent in their counterclaim. Therefore, the total damages for the period 2002–2005 and 2011–25 2013 was RM2,244,000 after deducting cost for maintenance of the billboard and MPSJ rental (see paras 57–58 & 64).

(4) Based on s 11 of the Civil Law Act 1956, the court had exercised discretion to grant interest of 5%pa on the judgment sum of RM2.244m to run from the date of filing of the writ until full settlement. Hence there is no merit in the motion by the first respondents to vary/set aside the judgment of this court pertaining to interest. This court was already *functus officio* to set aside or vary the decision (see paras 76–77).

[Bahasa Malaysia summary

Ini adalah dua rayuan oleh perayu terhadap keputusan Mahkamah Tinggi yang telah membenarkan rayuan kepada Hakim dalam Kamar oleh Metramac Corp Sdn Bhd (responden pertama) dan Big Tree Outdoor Sdn Bhd (responden kedua) dan membatalkan keputusan penolong kanan pendaftar ('PKP') Mahkamah Tinggi dan memberikan perayu award ganti rugi nominal RM50,000. Ia adalah kes responden pertama yang menurut perjanjian konsesi bertarikh 13 Februari 1992 antara dirinya dan Dato Bandar Kuala Lumpur, responden pertama diberi hak untuk berurusan dengan sekeping tanah ('tanah tersebut'). Defendan pertama kemudiannya melalui satu perjanjian bertarikh 9 Mei 1995 dengan responden kedua memberikan lesen kepadanya untuk mengurus, mengendali dan menyelenggara sebarang pameran pengiklanan atau perkara yang berkaitan dengan kawasan konsesi termasuk tanah tersebut. Kemudian pada tahun 2002, perayu telah diberikan lesen pendudukan sementara ('TOL') oleh pentadbir tanah ke atas tanah yang sama. Perayu memiliki TOL ke atas tanah itu untuk dua tempoh berbeza, dari 2002–2005 dan dari 2011–2015. Pada 15 Jun 2002, perayu cuba memasuki tanah itu untuk membina Unipole 2 belah di atasnya. Bagaimanapun, ia dihalang daripada berbuat demikian oleh responden pertama kerana responden kedua menduduki tanah tersebut. Responden pertama terus menghalang perayu daripada memasuki tanah itu untuk tahun-tahun berikutnya. Pada tahun 2003, perayu telah memulakan saman di Mahkamah Tinggi terhadap kedua-dua responden pertama dan kedua yang memohon untuk mengisytiharkan haknya di bawah TOL dan ganti rugi untuk pencerobohan tanah kerana kedua-dua responden pertama dan kedua telah mendapat manfaat daripada tanah tersebut sehingga merugikan perayu kerana ia tidak dapat mempamerkan iklan di atas tanah tersebut walaupun memegang TOL di atas tanah tersebut. Pada pertengahan 2005, responden pertama mengemukakan prosiding pihak ketiga dalam saman sivil yang sama terhadap pentadbir tanah kerana mengeluarkan TOL kepada perayu. Semasa pertikaian berterusan antara pihak-pihak, tiada TOL diberikan kepada perayu dalam

tempoh 2006–2010. Selepas taksiran kerugian, PKP memberikan jumlah ganti rugi kepada perayu sebanyak RM6,076,817.84 Kedua-dua responden merayu kepada hakim dalam kamar. Hakim Mahkamah Tinggi yang bijaksana ('HMT') kemudiannya membenarkan rayuan responden pertama dan kedua, mengetepikan perintah PKP dan menggantikannya dengan perintah supaya responden pertama dan kedua membayar ganti rugi nominal kepada perayu berjumlah RM50,000 berserta faedah 5% setahun mulai 26 Disember 2003 (tarikh pemfailan writ) sehingga penyelesaian penuh. Justeru, rayuan semasa.

Diputuskan, membenarkan rayuan:

(1) Terdapat keterangan jelas yang bertentangan di hadapan PKP bahawa perayu memiliki TOL bagi tempoh 2002–2005 dan 2011–2015. Responden pertama sendiri dalam penghujahannya mengakui bahawa perayu telah memiliki TOL dari 2002–2005 dan 2011–2013 dan tiada TOL diperolehi dari tahun 2006–2010. Perayu hanya menuntut ganti rugi sehingga 2013 dan tidak sehingga 2015 kerana responden telah memberikan milikan kosong tanah tersebut kepada perayu pada awal tahun 2014 (lihat perenggan 29–30).

(2) Mahkamah mendapati bahawa TOL telah tamat tempoh pada tahun 2005 dan tiada keterangan pembaharuan oleh pentadbir tanah untuk tahun-tahun berikutnya dari 2006–2010. Sehubungan itu, pembaharuan TOL adalah tidak automatik kerana ia adalah secara budi bicara pentadbir tanah seperti yang diperuntukkan di bawah s 67 Kanun Tanah Negara ('KTN') bahawa TOL hanya sah untuk tempoh satu tahun kalendar menurut s 67(3) KTN. Memandangkan perayu tidak memperoleh hak milikan ke atas tanah itu mahupun memperoleh apa-apa hak sebagai pemegang lesen di bawah TOL untuk tempoh 2006–2010, mahkamah berpendapat perayu tidak mempunyai sebarang hak undang-undang/ekuiti ke atas tanah tersebut sepanjang tempoh tersebut. Hak perayu ke atas tanah sebagai pemegang lesen di bawah TOL dihadkan hanya untuk tempoh 2002–2005 dan 2011–2013. Ini jelas bahawa perayu tidak berhak mendapat ganti rugi untuk tempoh dari 2006–2010 (lihat perenggan 34 & 36–37).

(3) Mahkamah berpendapat bahawa PKP yang bijaksana adalah jelas salah dalam bergantung kepada kontrak MAL-TEL sebagai asas untuk pengiraan kuantum ganti rugi bagi tempoh 2002–2005 kerana ia tidak akan mewakili atau mencerminkan sewaan yang adil pada kadar pasaran pada masa material memandangkan kontrak MAL-TEL hanya dilaksanakan pada 2011/2012 menunjukkan kadar pasaran pada tahun tersebut 2011 dan 2013. Oleh itu, ia adalah yang terbaik untuk digunakan sebagai asas untuk mengira ganti rugi bagi tempoh 2011–2013. Bagi ganti rugi bagi tempoh 2002–2005, mahkamah berpendapat pengiraan ganti rugi perlu berdasarkan keuntungan yang

diperoleh oleh responden kedua pada sekitar tahun 2003 iaitu RM250,000 setahun seperti yang diakui dengan jelas oleh responden kedua dalam tuntutan balas mereka. Oleh itu, jumlah ganti rugi bagi tempoh 2002–2005 dan 2011–25 2013 ialah RM2,244,000 selepas ditolak kos penyelenggaraan papan iklan dan sewa MPSJ (lihat perenggan 57–58 & 64).

(4) Berdasarkan s 11 Akta Undang-undang Sivil 1956, mahkamah telah menggunakan budi bicara untuk memberikan faedah sebanyak 5% setahun ke atas jumlah penghakiman RM2.244 juta bermula dari tarikh pemfailan writ sehingga penyelesaian penuh. Oleh itu tidak ada merit dalam usul oleh responden pertama untuk mengubah/mengenepikan penghakiman mahkamah ini berkaitan dengan faedah. Mahkamah ini sudah pun ber*functus officio* untuk mengetepikan atau mengubah keputusan (lihat perenggan 76–77).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (distd)

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2022] 1 MLJ 701, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Ganad Media Sdn Bhd & Anor v Sun Media Corporation Sdn Bhd & Ors [2015] 1 LNS 1064, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Syarikat Rodziah v Malayan Banking Bhd [2021] MLJU 166; [2021] 5 CLJ 170, CA (refd)

Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Evidence Act 1950
National Land Code ss 67, 67(1), (3), 68
Rules of Court 2012 O 42 r 13
Rules of High Court 1980 (repealed by Rules of Court 2012) O 14A

Appeal from: *Ganad Media Sdn Bhd v Metramac Corp Sdn Bhd & Anor (Pentadbir Tanah Daerah Petaling, third party)* [2010] MLJU 1361 (High Court, Kuala Lumpur)

Kenneth Koh Zhong Wey (with Cadmon Yeow Wen Xuan) (Nadzarin Kuok Puthucheary & Tan) in Civil Appeal Nos W-03(IM)-5–01 of 2021 and

W-03(IM)-71–09 of 2021 for the appellant.
Yau Her Lerk (Yau Partnership) in Civil Appeal No W-03(IM)-5–01 of 2021 for the respondent.
Peter Skelchy (with Joycelyn Teoh) (Cheah Teh & Su) Civil Appeal NoW-03(IM)-71–09 of 2021 for the respondent.

Supang Lian JCA:

INTRODUCTION

[1] These two appeals are brought by Ganad Media Sdn Bhd (appellant in Appeal 5–01 and Appeal 71–09/plaintiff in the High Court) against the decision of the High Court which had allowed the appeal to judge in chambers by Metramac Corp Sdn Bhd (respondent in Appeal 71–09 /first defendant in the High Court) and Big Tree Outdoor Sdn Bhd (respondent in Appeal 5–01 and the second defendant in the High Court) and overturning the decision of the senior assistant registrar of the High Court and awarding the appellant nominal damages of RM50,000.

[2] The parties will be referred to as they were in the High Court.

BACKGROUND

[3] It is the first defendant's (Metramac) case that pursuant to a concession agreement dated 13 February 1992 between itself and Dato Bandar Kuala Lumpur, the first defendant was given the right to deal with a piece of land, iePlot A, Kilometer 14 Lebuh Raya KL/Seremban, Mukim Petaling, 1600 KP ('the land').

[4] First defendant had then by an agreement dated 9 May 1995 with the second defendant (Big Tree), granted a licence to the latter to manage, operate and maintain any advertising hoardings or matters related to the concession area which included the land.

[5] Later in year 2002, the appellant (Ganad Media) was granted a temporary occupation license ('TOL') by the land administrator to the same land. plaintiff possessed the TOL on the land for two different periods, namely: from 2002–2005 and from 2011–2015.

[6] On 15 June 2002, plaintiff attempted to enter the land to construct a two-sided Unipole on it. However, it was prevented from doing so by the first defendant as the second defendant was occupying the land. The first defendant continued to prevent the plaintiff from entering the land for the subsequent years thereafter.

[7] The first and second defendants claimed that they were entitled to occupy the land and build a billboard on it notwithstanding that the plaintiff possessed the TOL.

[8] The plaintiff, on the other hand, claimed that throughout their illegal occupation of the land, both the first and second defendants profited from (illegal) billboard advertising on the land.

[9] In 2003, plaintiff commenced a suit in the High Court of Kuala Lumpur against both the first and second defendants seeking to declare its rights under the TOLs and damages for trespass on the land as both the first and second defendants had benefitted from the land to plaintiff's detriment as the latter could not advertise on the land despite holding a TOL on the land.

[10] The plaintiff's claim as pleaded in the statement of claim is for:

(a) a declaration that the plaintiff as the licensee pursuant to s 68 of the National Land Code is the licence holder of the TOL and is therefore entitled to the uninterrupted possession of the land together with all its fixtures and fittings;

(b) a declaration that the first defendant has infringed the statutory right of the plaintiff pursuant to s 68 of the National Land Code;

(c) a declaration that the second defendant has infringed the statutory right of the plaintiff pursuant to s 68 of the National Land Code;

(d) a declaration that the first defendant has trespassed into the land during the tenure of the TOL granted to the plaintiff;

(e) a declaration that the second defendant has trespassed into the land during the tenure of the TOL granted to the plaintiff;

(f) an injunction to restrain the first and second defendants whether by himself or by his servants or agents or otherwise however from trespassing on the land during the tenure of the TOL held by the plaintiff;

(g) damages;

(h) loss of profits from 15 May 2002 to 31 December 2002 for the sum of RM135,416.66;

(i) loss of profits from 1 January 2003 to 31 December 2003 for the sum of RM250,000;

(j) alternatively, for damages, restitutionary remedy of accounting and paying to the plaintiff all profits and/or gains made by the first and second defendants in the land during the material time in which the

plaintiff holds a TOL pursuant to s 68 of the National Land Code;

(k) interest on damages and/or remedy granted by the court at 8%pa from 15 June 2002 until the date of full realisation; and

(l) such further or other relief as the court sees fit.

[11] In mid-2005, the first defendant brought third party proceedings in the same civil suit against the land administrator for issuing TOLs to plaintiff. first defendant contended that the land administrator had no jurisdiction over the land and thus could not issue the TOLs. Whilst the dispute was ongoing between the parties, there was no TOLs granted to the plaintiff during the period of 2006–2010.

ORDER 14A OF THE RULES OF THE HIGH COURT APPLICATION

[12] Upon an application made under O 14A of the RHC 1980, the High Court had allowed the plaintiff's application for summary determination of the suit between the parties on point of law.

[13] On 31 May 2010, the learned High Court judge, Justice Lau Bee Lan, gave judgment for the plaintiff in respect of liability and ordered as follows:

(a) that as a holder of a TOL, the appellant is entitled to the uninterrupted possession of the land together with its fixtures and fittings;

(b) that first and second defendants had infringed plaintiff's statutory right under s 68 of the National Land Code;

(c) that first and second defendants had trespassed into the land during the tenure of the TOL granted to the plaintiff; and

(d) interest at the rate of 8%pa from 15 June 2022 until full realisation of the damages awarded by the court; and

(e) that plaintiff's entitlement to damages are to be assessed in terms of quantum and period ie whether the plaintiff is entitled to damages after 1 January 2006:

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Plaintif seterusnya diawadkan ganti rugi am dan ganti rugi khas untuk *ditaksirkan dari segi kuantum dan tempoh, iaitu samada Plaintif berhak untuk menuntut ganti rugi am selepas 1.1.2006*.

ASSESSMENT OF DAMAGES ('AOD') BEFORE THE SAR

[14] At the AOD before the senior assistant registrar ('SAR'), the plaintiff submitted that it is entitled to damages throughout the period from 2002–2013, ie from 1 July 2002 (after the defendants trespassed in mid-June

2002) to 31 December 2013 (before the defendants finally delivered up vacant possession in early 2014). The period of the claim is therefore 11¾ years or 138 months.

[15] The first defendant however submitted that the plaintiff is not entitled to damages from 2006–2015 because:

(a) for the period from 2006–2010 there was no TOL granted to plaintiff; and

(b) for the period of 2011–2015, there was no structural erection on the land by the plaintiff despite TOL being granted to the latter.

[16] The second defendant contended that the plaintiff is only entitled to damages from 2002 to 2006 and that too, provided that the plaintiff has established that it had suffered damages and losses during the TOL period, which the plaintiff has failed to prove.

[17] The SAR found as follows:

(a) based on the evidence of the witnesses, it is proven that the plaintiff had obtained the TOL for the period from 2002–2005;

(b) based on the evidence led, plaintiff had not obtained the TOL for years 2006–2010 on the land due to the ongoing third party suit between the first defendant and the land administrator;

(c) the legal principle that TOL can only be renewed annually does not apply to the circumstances of this case where at all material times TOL was only issued to the plaintiff; and

(d) even after being sued by the plaintiff, the defendants still continued to occupy the land. At all material times, first and second defendants were not entitled to occupy the land and had continuously trespassed on the land from 2002–2013, during which time, first defendant and/or second defendant had obtained profits from their illegal occupation of the land. The defendants are therefore liable to pay damages to the plaintiff for the period of trespass on the land from 2002 to 2013.

[18] In respect of the quantum of damages, the learned SAR found the total damages suffered by the plaintiff to be RM6,076,817.84, particulars of which are as set out in the appellant's/plaintiff's written submission as follows:

(a) the calculation for the total loss of profits for the duration of 138 months was done by taking the average of the profits which the plaintiff could have made over the period of 2002–2013 and multiplying it by the total duration of 138 months;

(b) the average loss of profits per month for 2002–2013 was RM30,958, which was arrived at by taking the average of the profits made at the beginning of the period in 2002 and the profits made at the end of the period in 2013 wherein:

(i) second defendant admitted in their counterclaim that back in 2003 it was earning profits of RM250,000pa (RM20,833.33 per month) from their billboard;

(ii) the plaintiff adduced two agreements (MAL-TEL contracts) which it had entered into in respect of the land during 2011–2013, where the profits were RM493,000pa (RM41,083.33 per month) which is derived after deducting the following costs of RM157,000 from the contract price of RM650,000:

(1) service tax — RM30,000;

(2) electricity charges — RM72,000;

(3) vinyl — RM48,000;

(4) TOL — RM3,000; and

(5) tree trimming and grass cutting — RM4,000,
(RM650,000 - RM157,000 = RM493,000)

(iii) RM20,833 + RM 41,083 = RM61,916. Therefore, the average market rental per month from mid-2002 to end of 2013 would be RM30,958.

(c) multiplying RM30,958 by 138 months totals RM4,272,204;

(d) costs to be deducted for maintenance of the billboard and rental to MPSJ was calculated to be RM110,000 for the period of 2002–2013;

(e) after deducting the costs, the total nett amount of loss of profits suffered by plaintiff would be RM4,162,204 ('total loss of profits');

(f) in respect of pre-judgment interest, the plaintiff only claimed for 4% interest per annum, being the average interest, on the basis that the total loss of profits were also calculated by taking an average. Therefore, the learned SAR agreed with the plaintiff's calculation of pre-judgment interest as follows:

RM4,162,204 x 4% pa x 11 % years = RM1,914,613.84

(g) thus, the total amount which was awarded by the learned SAR is calculated as follows:

RM4,162,204.00 + RM1,914,613.84 = RM6,076,817.841

(h) as for the post-judgment interest, the SAR had awarded 5% interest per annum from date of the assessment order until full settlement.

[19] Aggrieved by the decision of the SAR, first and second defendants appealed to the judge in chambers.

APPEAL TO THE JUDGE IN CHAMBERS

[20] The learned High Court judge allowed the first and second defendants' appeal, set aside the order of the SAR dated 18 September 2015 and substituted it with an order that the first and second defendants do pay the plaintiff nominal damages in the sum of RM50,000 together with interest at 5%pa from 26 December 2003 (the date of filing of the writ) until full settlement.

[21] In arriving at his decision, the learned High Court judge made the following findings:

(a) the plaintiff is only entitled to claim damages for the period which the plaintiff was given possession of a valid TOL at the material time (ie 2002–2005 only);

(b) the judgment on liability dated 31 May 2010 by Justice Lau Bee Lan, HCJ, had directed the learned SAR to assess damages for the period from 2002 until 2006 only but the SAR had assessed and awarded damages to the plaintiff for the period from 2002 until 2013. As such, the learned SAR had exceeded the scope of the order dated 31 May 2010;

(c) the judgment on liability dated 31 May 2010 clearly ordered that damages be granted to the plaintiff only up to 2005 whereby damages after 2006 is still subject to whether the plaintiff was in possession of any valid TOL for any subsequent years from 1 January 2006. However, the learned SAR has assessed and awarded damages to the plaintiff from 2002 until 2013 without any supporting document to show the damages suffered by the plaintiff and that from the evidence the plaintiff did not possess any valid TOL for the period from 2006 to 2013 for the land. In fact, the period from 2006 until 2013 was not even pleaded by the plaintiff in its statement of claim;

(d) as such, the assessment of damages granted by the learned SAR for the period from the year 2006 to 2013 where the plaintiff did not possess TOL ought not to be allowed. The plaintiff is only entitled to damages for the period from 2002 until 2005 as the plaintiff possessed valid TOL for that period;

(e) the renewal of TOL is not automatic as it is at the sole discretion of the Land Administrator as provided under s 67 of the NLC 1965 and that the TOL is only valid for a period of one calendar year pursuant to s 67(3) of the NLC. By allowing the assessment of damages for the period 2002 until 2013, learned SAR has clearly acted in excess of his jurisdiction and power;

(f) the SAR has premised the entire quantification of damages claimed by the plaintiff on mere projections based on contracts purportedly entered in 2011/2012 between the plaintiff and third party; MAL-TEL Technology Sdn Bhd (refer exh P38 and P32) to calculate loss of profits from mid-2002 to end of 2013;

(g) the learned SAR has failed to appreciate the basic principles of law governing the assessment of damages where only nominal damages should be awarded to the plaintiff where actual damage suffered could not be proven; and

(h) since there is no documentary evidence to support the plaintiff's method in assessing the plaintiff's damages or loss it suffered, and trespass to land is a tort actionable per se, nominal damages for the sum of RM50,000 would be suitable and reasonable considering the circumstances of this case.

[22] In essence, the learned High Court judge ruled that the plaintiff had simply failed to prove its damages suffered in accordance with the principles of law governing the assessment of damages which means that the plaintiff is only entitled to nominal damages in the circumstances.

IN THE COURT OF APPEAL

[23] Before us, the two main issues for determination are:

(a) the period for which plaintiff is entitled to damages to be assessed; and

(b) whether damages have been proven by plaintiff.

First issue: The period for which the appellant/plaintiff is entitled to damages to be assessed

The appellant/plaintiff's submission

[24] In this regard, the appellant contended that:

(a) the plaintiff was issued TOLs by the land administrator from 23 May 2002 to 31 December 2005 and from 2011 to 2015;

(b) the plaintiff was not issued TOLs for the period between 2006–2010,

due to the third party suit between first defendant and the land administrator. As such, plaintiff would have possessed the TOL for 2006–2010 but for first defendant's third party suit against the land administrator;

(c) the learned SAR was entitled to determine if the plaintiff was entitled to damages from 2006 onwards. This is because the last paragraph in the judgment on liability clearly empowers the learned SAR to decide on whether plaintiff was entitled to damages from 2006 onwards. It reads:

> *DAN ADALAH SELANJUTNYA DIPERINTAHKAN* bahawa Plaintif seterusnya diawadkan ganti rugi am dan ganti rugi khas untuk ditaksirkan dari segi kuantum dan tempoh. iaitu *samada Plaintif berhak untuk menuntut ganti rugi am selepas 1.1.2006*

(d) therefore, the learned High Court judge has erred in fact when holding that the SAR was not entitled to assess whether plaintiff was entitled to damages from 2006 onwards. The judgment on liability has enjoined the SAR to determine the duration of trespass and quantum of trespass after 1 January 2006, which is beyond the duration of 2002–2005 as stated by the learned High Court judge. Hence, the SAR had acted within his jurisdiction and within the scope of the judgment on liability when he determined that the plaintiff was entitled to damages from 2006 onwards as it would have obtained the TOL for 2006 to 2010, based on the evidence available to him, which are:

(i)
the only reason plaintiff had not obtained the TOL for 2006 to 2010 on the land was due to the ongoing third party suit between the first defendant and the land administrator;

(ii)
plaintiff has made all reasonable attempts necessary to renew the TOLs for the period of 2006 to 2010 but was denied due to the ongoing suit between the parties. It was for this reason that plaintiff had written to the land administrator to suspend the granting of any TOL pending the disposal of the third party suit between first defendant and the land administrator — this was done to preserve its rights to the TOL, which the land administrator acceded to. This was not a waiver or 'abandonment' of the renewal of the TOL by plaintiff as alleged by the defendants;

(iii)
thus, but for the defendant's third party suit against the land administrator, plaintiff could have and would have possessed the TOL for 2006 to 2010;

(iv)
despite having failed to obtain a TOL from 2006 to 2010 and despite Majlis Perbandaran Subang Jaya ('MPSJ') informing the second defendant to remove

its billboard in view of plaintiff's right of occupation, second defendant nevertheless continued to occupy the land with its billboard, at all times deriving profits from the same; and

(v)

plaintiff was issued with the TOL of the land immediately after determination of the suit between the parties in 2011. Even then, second defendant continued to occupy the land illegally and only handed vacant possession of the same back to plaintiff in 2013, at all times deriving profits from it.

[25] For the reasons adumbrated above, plaintiff submitted that it had been deprived of the use of the land from 2002–2013 due to the continuous trespass by first and second defendants and that the SAR's basis of assessment in awarding damages to plaintiff for the period from 2002–2013 was correct.

First defendant/respondent's submission

[26] Briefly, it is contended that:

(a) the High Court judge on 31 May 2010 only declared that the first and second defendants had trespassed into the land during the tenure of the TOL which was granted to the plaintiff. In other words, based on the High Court order dated 31 May 2010, first and second defendants are only liable for damages in trespassing the land for the period which plaintiff has been given possession of a valid TOL;

(b) it is not disputed that the plaintiff had possessed a TOL from 2002–2005 and 2011–2013. No TOL was obtained for the years 2006–2010;

(c) it is the plaintiff's position that no TOL was obtained from 2006–2010 due to the present court proceedings. However, there is no evidence of any representation made by the Land Office that the TOL was not granted due to the court proceedings;

(d) the fact that the TOL was issued from 2011–2013 cannot be applied to support the contention that a TOL would have been issued between 2006– 2010 if not for the court proceedings;

(e) the SAR had exceeded his jurisdiction in awarding damages for the years 2006–2010 when the plaintiff did not possess any TOL. In so doing, the SAR had clearly acted outside the order of the High Court given on 31 May 2010 which had only allowed damages to be assessed for trespass on the land *during the tenure of a valid TOL* granted to plaintiff; and

(f) Although plaintiff was holding a TOL from mid-2002 to 2005 and 2011 to 2013, no evidence was led by the plaintiff that it had obtained the approval from the relevant licensing authority at any material time to construct the two-sided Unipole on the land.

The second defendant/respondent's submission

[27] The second defendant submits that:

(a) based on the decision on liability, the SAR was directed to assess damages for the period from 2002 until 2005 only, but instead, the SAR had acted beyond jurisdiction by assessing and awarding damages to the plaintiff for the period from 2006 until 2013;

(b) based on the decision dated 31 October 20106, liability and damages for trespass were only allowed for the period when the plaintiff was in possession of a valid TOL;

(c) the SAR cannot assess damages for 2006 to 2013 when there was no order to do so;

(d) the plaintiff had only possessed valid TOLs for the years 2002, 2003, 2004 and 2005 and not for the years 2006 to 2010;

(e) oral and documentary evidence would also prove that it was in fact the plaintiff's own unilateral decision not to renew and/or obtain any TOL from 2006 to 2010. Based on the plaintiff's letter dated 20 April 2009 to the PTG, it was the plaintiff itself who requested for the TOL to be withheld by MPSJ and the plaintiff had on its own accord represented to MPSJ that the plaintiff was not pursuing any extension of the TOL until the disposal of the suit;

(f) since the plaintiff had on its own accord abandoned its rights to renew the TOL after 2005, the SAR was manifestly wrong to decide that the first and second defendants were at fault and that the plaintiff was still 'entitled' to claim from 2006 until 2010 despite not renewing the TOLs for those periods;

(g) pursuant to s 67(1) and (3) of the NLC, the plaintiff is required to renew the TOL annually and it is not as a matter of right that the TOL will be renewed. Therefore the findings of the learned SAR that 'Prinsip undang-undang bahawa TOL hanya boleh diperbaharui setiap tahun tidak terpakai kepada keadaan kes ini dimana pada setiap masa yang material TOL hanya dikeluarkan kepada Plaintif' is clearly misconceived and flawed at law. It cannot by any means suggest that the plaintiff would have the automatic right to renew the TOL but for the ongoing litigation;

(h) by virtue of not renewing the TOL from 2006 until 2010, the plaintiff cannot then be entitled to obtain damages from 2006 until 2010 when the plaintiff would in itself be unlawfully occupying and had no rights on the land;

(i) the damages for loss of profit of advertising rights on the land can only be assessed for the duration where the plaintiff possesses a valid TOL;

(j) it is not disputed that the plaintiff had only possessed a valid TOL from 2002 to 2005 and 2011 to 2013. The learned SAR has exceeded his jurisdiction in awarding damages for the years 2006 to 2010 when the plaintiff did not possess any TOL;

(k) the plaintiff has knowledge that the TOL is subject to renewal and there is no automatic renewal based on the decision of the High Court in *Ganad Media Sdn Bhd & Anor v Sun Media Corporation Sdn Bhd & Ors* [2015] 1 LNS 1064; and

(l) the SAR erred in his decision regarding the period of assessment and the High Court judge, on appeal, had correctly set aside the decision of the SAR.

[28] We are of the considered view that there was no proper judicial appreciation of the evidence on record when the learned High Court judge made the finding that the plaintiff is only entitled to claim damages for the period when the plaintiff was given possession of a valid TOL at the material time ie the period from 2002–2005. Further, we are of the view that the High Court judge has erred in her finding that the judgment of the High Court on liability dated 31 May 2010 by Justice Lau Bee Lan had directed the SAR to assess damages for the period from 2002 until 2006 only. The High Court judge erred in further finding that the plaintiff did not possess any valid TOL for the period from 2006 to 2013 for the land. The position in law has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong warranting appellate intervention (*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[29] Our reasons for so saying are these. There was clear evidence to the contrary before the SAR that the plaintiff possessed TOL for the period 2002–2005 and 2011–2015. The first defendant itself in its submission conceded that the plaintiff had possessed a TOL from 2002–2005 and 2011–2013 and that no TOL was obtained from the years 2006–2010.

[30] We take cognisance that the plaintiff is only claiming for damages until 2013 and not until 2015 as the defendants had given vacant possession of the land to the plaintiff in early 2014.

[31] Given the above factual matrix, we are of the opinion that the plaintiff is clearly entitled to damages for the period when the plaintiff had a valid TOL on the land ie from 2002–2005 (ie from 1 July 2002–31 December 2005) and from 2011–2013. In other words, damages ought to be assessed for trespass on the land during the tenure of a valid TOL granted to the plaintiff as reflected in

A the judgment on liability dated 31 May 2010 by Justice Lau Bee Lan as follows:

> *that first defendant and second defendant had trespassed into the said Land during the tenure of the TOL granted to the plaintiff;* (Emphasis added)

B **[32]** We also find that the High Court judge was plainly wrong in finding that the SAR was not entitled to assess the plaintiff's entitlement to damages from 2006 onwards. The SAR, to our mind, was entitled to make that determination and this is because the judgement on liability clearly empowers the SAR to so decide. We reproduce the relevant part of the order of the High C Court which enables the SAR to so determine:

> *DAN ADALAH SELANJUTNYA DIPERINTAHKAN* bahawa Plaintif seterusnya diawadkan ganti rugi am dan ganti rugi khas untuk ditaksirkan dari segi kuantum dan *tempoh, iaitu samada Plaintif berhak untuk menuntut ganti rugi am selepas 1.1.2006*.

D

[33] The judgment on liability dated 31 May 2010 above, in no uncertain terms states that the damages is to be assessed in terms of quantum and the period ie *whether the plaintiff is entitled for damages after 1 January 2006*. This E empowers the SAR to decide as to whether there was any trespass by the first and second defendants on the land after 1 January 2006, and if so whether the plaintiff is entitled to damages for the ascertained period.

[34] In respect of the plaintiff's submission that they could have and would F have possessed the TOL from 2006 to 2010 (the impugned period) but for the defendant's third party suit against the land administrator, we find that this contention does not hold water for the simple reason that the TOL has expired in 2005 and there was no evidence of renewal by the land administrator for the subsequent years from 2006–2010. In this regard we agree with the finding of G the High Court judge that the renewal of TOL is not automatic as it is at the sole discretion of the land administrator as provided under s 67 of the NLC and that the TOL is only valid for a period of one calendar year pursuant to s 67(3) of the Code.

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[35] Section 67(1) and (3) of the NLC 1965 provides that:

> (1) Except in so far as it is otherwise prescribed, every temporary occupation licence other than one to which section 69 applies (that is to say, a temporary occupation licence combined with a permit to extract and remove rock material) shall be issued I for a term not later than the end of the calendar year in which it commences, and subject to sub-section (3) may be renewed annually.
>
> ...

(3) Subject to the condition under which a temporary occupation licence is issued, the Land Administrator may on the application of a licensee renew such licence for a term of not more than one calendar year.

[36] Clearly then, s 67(1) and (3) of the NLC requires the plaintiff to renew the TOL annually. There is no question of the TOL being renewed automatically as a matter of right or that there was implied consent by the land administrator that the plaintiff's TOL would be renewed automatically but for the ongoing legal dispute between the parties. In fact, the plaintiff in their submission had admitted that it had carried out all reasonable attempts necessary to renew the TOLs for the period of 2006 to 2010 but was denied due to the ongoing court proceedings between the parties and that they had written to the land administrator to suspend the granting of any TOL pending the disposal of the third party suit between first defendant and the land administrator to preserve its rights to the TOL. This flies in the face of their submission that 'but for the defendant's third party suit against the land administrator, the plaintiff could have and would have possessed the TOL for 2006 to 2010'. Moreover, there was no evidence adduced in this regard.

[37] Given that the plaintiff has neither acquired proprietary right over the land nor acquired any right as a licensee under a TOL for the period 2006–2010, we find that the plaintiff has no legal/equitable rights whatsoever over the land during that period. Hence, the plaintiff's submission that they had been deprived of the use of the land from 2002–2013 due to the continuous trespass by first and second defendants is flawed. Instead, the plaintiff's right over the land as licensee under a TOL is restricted only to the period 2002–2005 and 2011–2013. It follows that the plaintiff is not entitled to damages for the period from 2006–2010.

[38] The case of *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701 cited by the plaintiff is distinguishable on its facts as the observations of the Federal Court there are on the principles of law of trespass and continuing trespass where a registered owner of the land is entitled to damages, whereas in the present appeal the plaintiff is neither a registered owner nor a licensee under a TOL and is thus not accorded such right to occupy the land. A plaintiff can only claim for damages for trespass when they are bestowed with such right permissible under the local laws of the country, which is governed by the National Land Code. There is no authority or provision of the law cited by the plaintiff which accords them a right over the land when no TOL was issued for the period of 2006–2010. This puts paid to the plaintiff's claim of being a victim of trespass for that period.

[39] For the reasons stated above, we hold that the High Court judge was right in finding that the SAR has clearly acted in excess of jurisdiction and power in assessing damages for the impugned period (2006–2010).

Second issue: Whether the appellant/plaintiff has proved its damages

The appellant/plaintiff's contentions

[40] The non-performance of the MAL-TEL contracts cannot and ought not to deprive the plaintiff from claiming for the loss of profits rightfully owed by the defendants to them as the MAL-TEL contracts could not be performed since the defendants were in illegal occupation of the land at the material time. In fact, plaintiff's attempt to enter into the land was always obstructed by the defendants.

[41] The learned High Court judge ought to have applied the MAL-TEL contracts as a comparative basis in assessing the damages to be awarded to the plaintiff as the SAR has done.

[42] The plaintiff has in fact proven its actual loss of profits before the assessment of damages hearing before the learned SAR based on both the documentary and oral evidence tendered before the court at the hearing.

[43] The learned High Court judge's award of RM50,000 as nominal damages to the plaintiff contradicts the evidence tendered before the learned SAR and is wholly erroneous in light of the documentary and oral evidence tendered before the court. Appellate intervention is thus warranted.

[44] The defendants had challenged the authenticity of the MAL-TEL contracts, relying on the High Court decision in *Ganad Media Sdn Bhd & Anor v Sun Media Corporation* ('the *Sun Media* case'). The plaintiff submits that the defendants had every opportunity to rebut and/or refute the authenticity and/or basis of calculations premised on the MAL-TEL contracts, but failed to do so.

The first respondent/defendant's submission

[45] The first defendant contended that:

(a) the plaintiff should not have been permitted to rely on mere projections premised on the two contracts entered in 2011/2012 with MAL-TEL Technology;

(b) plaintiff is not claiming for profits that the first and second defendants had actually made. Instead it had elected to claim for the profits from the

market rent it could have earned but for the defendants' trespass ie damages on the basis of loss of use of the land;

(c) the burden of proof lies with the plaintiff to put forth reliable evidence of what would represent a fair rental at market rates that the plaintiff would have in all probability earned from the land;

(d) no expert witness was called by the plaintiff in relation to the quantum of damages suffered;

(e) PW2 admitted and confirmed that that the two contracts purportedly entered between the plaintiff and MAL-TEL Technology (exhs P32 and P38) in 2011 and 2012 were never performed;

(f) no evidence was led by the plaintiff to show that the figures in the two contracts with MAL-TEL were to be the rental rates and/or the agreed rental rates for the year back in 2002 and corresponding years;

(g) the learned SAR had only considered the figures in the two contracts with MAL-TEL purportedly entered in 2011/2012 to assess damages from year 2002 to 2013;

(h) there was no evidence led by the plaintiff at the assessment hearing that the figures in the contracts purportedly entered in 2011/2012 were substantiated with real comparative data for years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and/or 2013;

(i) no real time data was ever produced by Ganad Media in order to support the damages claimed; and

(j) no published industry reference materials were ever produced.

The second respondent/defendant's submission

[46] This can be summarised as follows:

(a) the said MAL-TEL contracts (exhs P38 and P32) were not even the basis used by the plaintiff in arriving at the calculation of RM6,076,817.84. As can be seen from the calculation by PW2 in his witness statement (WSPW2) at para 18.1 to 18.6 and reiterated in the plaintiff's submission dated 28 July 2015 at para 29, the plaintiff arrived at RM6,076,817 based on the assumption of yearly profit margin;

(b) the sum of RM6,076,817.84 was never derived from the MAL-TEL contracts;

(c) the plaintiff itself did not originally intend to rely on the MAL-TEL contracts to attempt to prove damages for the period from 2002 until 2010 as the MAL-TEL contracts were meant for the years 2011 and 2012 only;

(d) the plaintiff has actually tried to rely on many other non-executed contracts which were never performed to prove its losses for the period from 2002 until 2010 but ultimately abandoned the purported contracts above and had simply relied on the assumed yearly profit margin as a basis of their calculation;

(e) the plaintiff was not even sure of the evidence which it intended to use in assessing damages;

(f) the plaintiff has failed to actually prove damages and it is not enough for the plaintiff to merely write down the particulars of what it wants and ask the court to award it such damages;

(g) the plaintiff's production and reliance on the MAL-TEL contracts in the present case is highly suspicious based on the case of *Ganad Media v Sun Media*;

(h) there are valid reasons to suspect the authenticity of the MAL-TEL contracts in the present case based on Justice Lau Bee Lan's finding that a similar MAL-TEL contracts in the *Ganad Media v Sun Media* case were fabricated; and

(i) since the plaintiff has completely failed to prove damages, the nominal damages of RM50,000 awarded by the learned High Court judge is fair and just as a token compensation merely for the fact of trespass.

OUR DECISION ON THE SECOND ISSUE (QUANTUM OF DAMAGES)

[47] We are of the considered view that there was no proper judicial evaluation of the evidence on record when the learned High Court judge made the finding that the SAR has premised his entire quantification of damages claimed by the plaintiff on mere projections based on contracts purportedly entered in 2011/2012 between the plaintiff and third party; MAL-TEL Technology Sdn Bhd (see exhs P38 and P32) which were not performed, to calculate loss of profits from mid-2002 to end of 2013.

[48] The MAL-TEL contracts (exhs P38 and P32) to our mind, were properly admitted in evidence at the assessment hearing and have passed the test of admissibility under the Evidence Act 1950. Based on the appeal records before us, we find that there is clear evidence on this from PW6, one Encik Shafiq Chan Abdullah, who confirmed that he executed the two contracts on behalf of MAL-TEL Technology Sdn Bhd with the plaintiff in 2011/2012.

[49] As can be gleaned from the notes of proceedings, there was no objection recorded on the admissibility of P38 and P32 and both of these documents

were duly admitted as evidence. Besides, PW6 (the maker) was cross-examined on the contents of these contracts and there was no challenge mounted by the defendants' solicitors on the authenticity of these MAL-TEL contracts at that point of time.

[50] The contention by counsel for the second defendant that P32 and P38 were fabricated predicated on the decision of the High Court in *Ganad Media* ('*Sun Media* case') is without basis. We agree with counsel for the plaintiff that the second defendant had every opportunity to rebut and/or refute the authenticity and/or basis of calculations premised on the MAL-TEL contracts. However, they failed to do so.

[51] The plaintiff submitted that the *Sun Media* case was decided on 29 September 2015, whilst the appeal to the judge in chambers in respect of the assessment of damages was decided on 18 September 2020. At the hearing of the appeal to the judge in chambers against the assessment decision, the second defendant had attempted to adduce fresh evidence in the form of the *Sun Media* case but that was dismissed by the learned High Court judge. The second defendant had filed an appeal against the learned High Court judge's dismissal of its application, but had then withdrawn the same.

[52] To our mind, the second defendant is attempting to admit the *Sun Media* case in the present appeal through their written submission and in so doing, is indirectly trying to admit fresh evidence before this court with no prior leave obtained from this court. The fresh evidence as alleged by the second defendant is not before us in the appeal records in order for us to make a proper evaluation in deciding on the authenticity of the MAL-TEL contracts.

[53] If the second defendant was serious in its challenge of the authenticity of P32 and P38, we expect them to have filed the proper application to obtain the necessary court order to adduce fresh evidence in this regard. They did not do so. In the circumstances, we are constrained to hold that exhs P32 and P37 (the MAL-TEL contracts) are admissible in evidence and could be relied on by the plaintiff to prove their damages even though these contracts were not performed.

[54] On 23 April 2014, PW6 testified that exh P32 is the contract for the period 2011 whilst P38 is for the period 5 July 2012 and 4 July 2013. PW6 said that if the plaintiff did not put up the advertisement, then MAL-TEL would not be liable to make payment to the plaintiff. Likewise, the plaintiff was also not responsible to compensate MAL-TEL for not putting up the advertisement. PW6 further testified that the contracts are certain in the sense that the advertisements would be put up by the plaintiff but was uncertain as to the date of performance when the advertisements would actually be put up.

PW6 added that if the plaintiff did put up the advertisements, then MAL-TEL was bound to pay the plaintiff at the agreed rate or pro-rated rate depending on the date they put up the advertisement, the earlier the better.

[55] Based on the testimony of PW6 from MAL-TEL Technology, we are of the view that P32 and P38 are valid contracts entered into by the plaintiff and MAL-TEL Technology and the learned SAR was right in applying these contracts as a basis for the calculation of damages for trespass in this appeal.

[56] We also find merit in the plaintiff's argument that the non-performance of the MAL-TEL contracts cannot extinguish their claim for the loss of profits that they were entitled to under the MAL-TEL contracts since it was the defendants' wrongful occupation of the land at the material time that had prevented the plaintiff from entering the land to perform the contracts. The plaintiff only obtained vacant possession in early 2014.

[57] That said, we are of the opinion that the learned SAR, however, was plainly wrong in relying on the MAL-TEL contracts as the basis for its quantification of the quantum of damages for the period of 2002–2005 since it would not represent or reflect a fair rental at market rates at that material time given that the MAL-TEL contracts were only executed in 2011/2012 indicating market rates in the year 2011 and 2013. Hence, they are best to be utilised as a basis to compute damages for the period from 2011–2013.

[58] As for the damages for the period from 2002–2005, we are of the considered view that the calculation of damages should be based on the profits that the second defendant made back in around 2003 ie RM250,000pa as clearly admitted by the second defendant at para 22 of their counterclaim.

[59] The second defendant at para 22 of their counterclaim pleaded that their annual loss of profit is in the region of RM250,000 from the billboard advertising on the land. Paragraph 22 reads:

> 22. Dengan itu Defendan Ke-2 akan mengalami kerugian dalam lingkungan RM250,000.00 setahun iaitu keuntungan yang dapat diperolehi daripada unipole pengiklanan tersebut.

[60] It is trite law that admissions in pleadings would amount to judicial admissions. We associate with the observations of the Court of Appeal in *Syarikat Rodziah v Malayan Banking Bhd* [2021] MLJU 166; [2021] 5 CLJ 170 at 188–189 that:

> [46] ... once it is established that a party has adopted a particular stance in an action before the court, it is estopped from changing that stance in another action, and its admissions in pleadings would amount to judicial admissions admissible against it.

[61] In *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 at pp 921–923, the Court of Appeal stated as follows:

> [18] In the earlier suit filed by the original owners of USESB (the vendor of the said land), the respondent itself had taken the position that the registrar of titles was solely at fault and responsible for the loss suffered and that the respondent, through the appellants had adhered to all prudent banking practices in granting the loan facility and that all documentation was valid.
>
> [20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402; [1999] 7 CLJ 328 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee)* [2011] 6 MLJ 193; [2011] 9 CLJ 859; [2010] 1 LNS 1269) as follows:
>
> > (2) The plaintiff is entitled to rely on the defendant's affidavit filed in Suit No 22–18–96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admissions are admissible against the party making them.
>
> [21] Further in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:
>
> > For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.
>
> [22] The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. The respondent is estopped from taking a position different from that pleaded on its defence in the earlier suit.

[62] We agree with the above proposition of law and find that the clear admission by the second defendant in their pleading as to the loss of annual profit in the region of RM250,000 from the billboard advertising on the land is a sure foundation for the plaintiff's entitlement to damages for trespass on the land in the region of RM250,000pa for the assessment period from 2002–2005.

[63] Based on the foregoing, we find that the plaintiff has proved its damages as follows:

(a) 1 July 2002–31 December 2005 (3 1/2 years)
= RM250,000 x 3.5 years = RM875,000;

(b) 2006–2010 (no damages awarded);

(c) 2011–2013 (three years)

= RM650,000 - RM157,000 (cost) x 3 years = RM493,000 x 3 years = RM1,479,000
= RM493,000 x 3 years
= RM1,479,000; and

(d) costs to be deducted for maintenance of the billboard and rental to MPSJ — RM110,000.

[64] Therefore the total damages for the period 2002–2005 and 2011–2013 is RM2,244,000 after deducting cost for maintenance of the billboard and MPSJ rental.

CONCLUSION

[65] For the reasons stated above, we would allow the plaintiff's Appeal No W-03(IM)-5–01 of 2021 and Appeal No W-03(IM)-71–09 of 2021 in part with costs. The decision of the learned High Court judge in granting only nominal damages of RM50,000 is set aside and substituted with an award of RM2,244,000 together with interest at 5%pa from 26 December 2003 (the date of the filing of the writ) till the date of full settlement and to be paid by the respondents jointly and severally.

[66] Costs of RM15,000 to the appellant for each appeal here and below subject to payment of allocator.

THE RESPONDENT'S MOTION IN ENCL 59

[67] After the broad grounds of decision was delivered on 12 May 2023, the respondent (Metramac Corporation Sdn Bhd) in Appeal No W-03(IM)-71–09 of 2021 filed a notice of motion (encl 59) on 9 June 2023, to vary/set aside the judgment of this court pertaining to interest. The prayers sought in encl 59 are:

(a) that the terms of the award of interest at the rate of 5%pa on RM2,244,000 from the date of the filing of the appellant's writ on 26 December 2003 until date of full settlement of the order pronounced by this court on 12 May 2023 be set aside and/or varied;

(b) cost of this motion to be borne by the appellant; and

(c) any such further and/or other relief(s) deemed fit and just to be granted by this honourable court

[68] Briefly, the grounds for this motion, inter alia, are:

(a) damages was to be assessed by the learned High Court Senior Assistant Registrar ('SAR') on 18 September 2015. At this juncture, the quantum

of damages owed by the respondent to the appellant remained unascertained. In this regard, the learned SAR had awarded the appellant with damages in the sum of RM6,076,817.84;

(b) upon the respondent's appeal, the learned SAR's decision was later set aside by the order of the High Court dated 18 September 2020, which only awarded nominal damages in the sum of RM50,000 to the appellant. Hence, this is the subject matter of the appellant's appeal before this honourable court;

(c) this appeal was heard together with Civil Appeal No W-03(IM)-5–01 of 2021 and at the decision fixed on 12 May 2023 this court pronounced its order ('COA order') in the following terms:

(i) damages in the sum of RM2,244,000.00 ('RM2.244m') awarded in favour of the appellant, to be paid jointly and severally by the respondent and Big Tree Outdoor Sdn Bhd ('Big Tree');

(ii) interest at the rate of 5%pa on the sum of RM2,244,000 from 26 December 2003 (date of filing of the appellant's writ) until date of full settlement, to be paid jointly and severally by the respondent and Big Tree; and

(iii) costs of RM15,000 to be paid by the respondent;

(d) in this regard, this court held, amongst others, that:

(i) the appellant had failed to prove its damages for the period between 2006 to 2010;

(ii) Big Tree had made a judicial admission of the appellant's loss of profits between year 2002 to 2005;

(iii) the appellant had successfully proved its loss of profits for the period between 2011 to 2013;

(iv) in conclusion, this court had awarded the appellant with total damages in the sum of RM2.244m;

(e) premised on the above findings by this court, it is obvious that the entire sum of RM2.244m was not yet owed by the respondent to the appellant at the date of filing of the appellant's writ on 26 December 2003. This is obvious since no damages were incurred by the appellant from 2006 to 2010;

(f) hence, by way of the respondent's solicitors' letter dated 17 May 2023, the respondent sought a clarification of the terms of the COA order for, inter alia, interest awarded on sums prospectively, and interest awarded for the period of 2006 to 2010 over which the appellant had no right to damages;

(g) by the appellant's solicitors' letter dated 18 May 2023, the appellant objected to the respondent's request for clarification;

(h) by an email dated 26 May 2023, a clarification was fixed before this court on 16 June 2023. Parties were further directed to file their respective submissions on 2 June 2023 and submissions in reply on 9 June 2023;

(i) in view that the date of clarification was fixed beyond the time limit for setting aside and/or varying an order as stipulated in O 42 r 13 of the Rules of Court 2012, the respondent filed this motion and its affidavit in support, in an abundance of caution, in order to preserve its right to set aside and/or vary the COA order;

(j) the appellant has been unjustly enriched by the order pronounced on 12 May 2023 as the sum RM2.244m was not owed by the respondent at the time of the filing of the appellant's writ, and thus the terms of the said COA order in relation to the interest ought to be set aside and/or varied *ex debito justitiae* for breach of natural justice;

(k) alternatively, the said terms of the COA order regarding interest on the RM2.244m ought to be varied as follows:

(i) interest at the rate of 5%pa on the RM2.244m from the date of the High Court order dated 18 September 2020; or

(ii) interest at the rate of 5%pa on the RM2.244m from the date of assessment of damages by the learned SAR on 18 September 2015.

[69] The appellant argued that the filing of encl 59 is misplaced on the following grounds:

(a) the content of paras 18 to 25 of the respondent's affidavit of support are denied. Those paragraphs are points of law and will be argued by the appellant's solicitors later in the appropriate forum; and

(b) although the respondent is not satisfied with the decision of the Court of Appeal and disputes its jurisdiction pursuant to s 11 of the Civil Law Act 1967, this honorable court is not the appropriate forum for these issues to be ventilated;

(c) the filing of encl 59 by the respondent is misplaced in terms of facts and law;

(d) the filing of encl 59 is an act to divert the attention of the court from the legal procedure that should be taken by respondent;

(e) the order of the Court of Appeal dated 12 May 2023 is in accordance with the available evidence and based on its jurisdiction, and the said order is legally valid; and

(f) the respondent did not present any reasonable grounds to support the filing of encl 59.

[70] It is conceded by the appellant that pursuant to O 42 r 13 of the Rules of Court 2012, this court is vested with the jurisdiction and power to set aside or very orders pronounced, but this power is subject to the trite principles of law governing the same. The order in this case, was pronounced by this court on merits upon consideration of all the cause papers filed herein and hence does not fall within the primary ambit of O 42 r 13.

[71] Further, the order falls short of the primary ambit of O 42 r 13 of the Rules of Court 2012 and the special exception expounded in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. Hence, there is no need to invoke this court's inherent jurisdiction and reliance on *Badiaddin* is wholly misplaced and contrived.

[72] Additionally, if the respondent is dissatisfied with the order, the respondent's motion is not the appropriate mode to ventilate the same.

[73] Notwithstanding the above, the appellant submitted that pursuant to s 11 of the Civil Law Act 1956, the court has unfettered discretion to award interest, whether from the date the cause of action arose, or from the date the action was filed. Hence, the order for interests is well within the scope of this court's discretion.

[74] Finally, the cause of action was founded on the tort of trespass. It is trite that the tort of trespass is actionable per se. The appellant contended that as the trespass had arisen prior to the filing of the action, the appellant is undoubtedly entitled to damages from the date from which the trespass had arisen.

[75] Based on the above, the appellant prayed that the motion in encl 59 be dismissed with cost.

OUR DECISION ON THE MOTION ENCL 59

[76] The motion was heard on 29 November 2023. We agreed with the contention of the appellant that this court is already functus officio to set aside or vary the decision. Furthermore, this application, to our minds, does not fall under the exception enunciated in *Badiaddin* where the Federal Court held as follows:

> [1] It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But *one special exception to this rule is where the final judgment of the High Court could be proved to be*

A *null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective*
B *order null and void on ground of illegality or lack of jurisdiction.* The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. *In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.*

C

[77] The principles in *Badiaddin* are in the context of an order made in contravention of statute to the extent of illegality and excess of jurisdiction, which is not the case here. The respondent's motion here is premised on a mere dissatisfaction with the court order.

D

[78] In any event we have looked into the merits of the motion filed by the applicant. In this case the judgment sum awarded by this court is for an amount of RM2.244m. Based on s 11 of the Civil Law Act 1956, we had exercised our discretion to grant interest of 5%pa on the judgment sum of RM2.244m to run from the date of filing of the writ until full settlement. Hence there is no merit in the motion. The motion is dismissed with costs of RM5,000 payable by the applicant to the respondent.

E

F **[79]** Consequently, we ordered that time to file any appeal with regard to the decision dated 12 May 2023 will start from 29 November 2023, which is the date of decision in respect of this motion ie encl 59.

Appeal allowed.

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Reported by Muhammad Azhma Marwan

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I